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**VIA E-MAIL**  
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Jeff S. Jordan, Esq.  
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Federal Election Commission  
1050 First Street, NE  
Washington, D.C. 20463

**Re: MUR 7717**

Dear Mr. Jordan:

We write as counsel to SMP and Rebecca Lambe, in her official capacity as Treasurer (collectively, “Respondents”), in response to the Complaint filed by the Foundation for Accountability and Civic Trust (“FACT”) on March 18, 2020, alleging a violation of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Federal Election Commission (“FEC” or the “Commission”) regulations.

The Complaint falsely alleges that Respondents engaged in prohibited coordination with Theresa Greenfield and Theresa Greenfield for Iowa (“the Committee”), in connection with an advertisement that features U.S. Senate candidate Theresa Greenfield. The Complaint also alleges that the advertisement constitutes an impermissible contribution through the republication of campaign materials. The only factual basis for these allegations is that the advertisement includes short b-roll video clips of Theresa Greenfield, two photographs of Theresa Greenfield, and widely-known facts about Theresa Greenfield’s background, which were also posted on the Committee’s publicly available website. As FACT is well aware, the Commission has repeatedly made clear that such activity does not constitute “coordination” for purposes of the Act. The Commission has also consistently failed to find reason to believe that the brief and sporadic incorporation of materials from a candidate’s public website in an advertisement amounts to republication under the Act or Commission regulations.

As no coordination took place and the Complaint does not allege any facts demonstrating that coordination took place, and because the Complaint does not allege facts establishing that the advertisement constitutes a contribution by republishing campaign materials, the Commission should find no reason to believe that Respondents violated the Act or FEC regulations and should dismiss the Complaint.

## FACTUAL BACKGROUND

Theresa Greenfield is a candidate for U.S. Senate in Iowa in 2020,<sup>1</sup> and Theresa Greenfield for Iowa is her principal campaign committee.<sup>2</sup> The Committee maintains a publicly available website located at [www.greenfieldforiowa.com](http://www.greenfieldforiowa.com) to communicate information about Theresa Greenfield to the general public.

SMP is a federal Super PAC.<sup>3</sup> As such, SMP operates completely separately from any candidates and their committees, including Theresa Greenfield and her Committee.

## LEGAL ANALYSIS

### A. The Complaint Alleges No Facts that Establish that the Advertisement at Issue Is a Coordinated Communication

The Complaint alleges that Respondents coordinated with Theresa Greenfield and her Committee in the production of a television advertisement. However, the Complaint does not provide any facts establishing that the advertisement was a coordinated communication. A communication is a “coordinated communication” under 11 C.F.R. § 109.21 only if it satisfies all three prongs of the regulation: the payment prong, the content prong, and the conduct prong. The Complaint fails to allege any facts that demonstrate that the conduct prong is satisfied in connection with the referenced advertisement. As such, the Complaint fails to allege facts which, if true, would constitute a violation of the Act or FEC regulations and must be dismissed.<sup>4</sup>

#### 1. The Complaint Alleges No Facts that Establish that the Conduct Prong Is Met

The Complaint claims that the advertisement meets the conduct prong under 11 C.F.R. § 109.21(d)(1) because the Committee requested the advertisement through a public posting on the Committee’s website titled “Important Update” and language such as “Iowa voters need to hear about.”<sup>5</sup> This assertion is simply incorrect as a matter of law. The Commission’s regulations, and the Commission’s interpretation of those regulations on numerous occasions, make clear that communications appearing on a campaign’s publicly available website are never sufficient to find that the conduct prong has been satisfied.

As part of the revision of the coordination regulations in 2003, the Commission established that the conduct prong would be satisfied if a campaign made a “request or suggestion” that a third

<sup>1</sup> Theresa Greenfield, FEC Form 2 - Statement of Candidacy (Apr. 10, 2020), <https://docquery.fec.gov/pdf/314/202004109216632314/202004109216632314.pdf>.

<sup>2</sup> *Id.*; Theresa Greenfield for Iowa, FEC Form 1 - Statement of Organization (Apr. 10, 2020), <https://docquery.fec.gov/pdf/282/202004109216632282/202004109216632282.pdf>.

<sup>3</sup> SMP, FEC Form 1 - Statement of Organization (Oct. 1, 2019), <https://docquery.fec.gov/pdf/667/201910019163579667/201910019163579667.pdf>.

<sup>4</sup> See 11 C.F.R. § 111.4(a), (d); MUR 4960 (Clinton for U.S. Senate), Statement of Reasons, Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

<sup>5</sup> Compl. p. 2, 9.

party disseminate a communication on its behalf.<sup>6</sup> In the accompanying Explanation and Justification, the Commission clarified that “[t]he ‘request or suggestion’ conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).”<sup>7</sup> A request or suggestion made on a publicly available website simply does not satisfy the conduct prong.

The Commission subsequently confirmed that the use of publicly available information by a third party does not satisfy the conduct prong, noting that “[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate’s or political party’s Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication.”<sup>8</sup>

The Commission has re-affirmed this basic principle through the enforcement process. In MUR 6821, the FEC dismissed a complaint that alleged that a coordinated communication occurred when Senate Majority PAC aired an advertisement with similar themes to those contained in a message posted on the publicly available website of Shaheen for Senate, the principal campaign committee of Senator Jeanne Shaheen. In finding that there was no reason to believe that any violation of the Act occurred, and dismissing the complaint, the Commission emphasized that “a communication resulting from a general request to the public or the use of publicly available information, including information contained on a candidate’s campaign website, does not satisfy the conduct standards.”<sup>9</sup> Further, in MUR 7124, the Commission dismissed a complaint filed by FACT against Katie McGinty, a candidate for U.S. Senate. The complaint alleged that coordinated communications occurred when Women Vote! and Majority Forward paid to air three separate television advertisements supporting McGinty that contained themes similar to those posted on McGinty’s publicly available campaign site. The Commission voted 5-0 to dismiss the complaint and made clear once again that “the ‘request or suggestion’ ‘conduct’ standard refers to requests or suggestions ‘made to a select audience, but not those offered to the public generally,’” and therefore, a request that is posted on a web page that is available to the general public does not trigger the request or suggestion content standard.<sup>10</sup>

Here, as was the case in MUR 6821 and 7124, the message identified in the Complaint as a “request” was posted on the publicly available website of the Committee. The message was accessible directly through a prominent link on the [www.greenfieldforiowa.com](http://www.greenfieldforiowa.com) homepage. Accordingly, the posting of content on the Committee’s publicly available site cannot be a basis to find that Respondents’ advertisement at issue satisfies the conduct prong.

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<sup>6</sup> 11 C.F.R. § 109.21(d)(1).

<sup>7</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

<sup>8</sup> Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

<sup>9</sup> See MUR 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015).

<sup>10</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 8-9 (May 4, 2017).

Perhaps because FACT knows that a message on a public website is insufficient to establish coordination, the Complaint alleges that private communications must have occurred between the parties, claiming that “because Greenfield knew to use this format, it also indicates other communications occurred.”<sup>11</sup> Yet, the Complaint provides absolutely no evidence or support for the assertion that any non-public communications occurred.

Furthermore, the Complaint alleges that coordination must have occurred between the parties because of the “close proximity in time between the campaign providing the instruction and materials and . . . [SMP] running the advertisement.”<sup>12</sup> However, the fact that the Committee’s website was updated in early February and Respondents began running the advertisement during the final days of February is not proof of any coordination.<sup>13</sup> The Commission has previously dealt with similar baseless allegations also made by FACT regarding private communications and proximity in MUR 7124 and held that “similarities between [the campaign website] and the commercials, and the timing and geographical placement of the commercials, are insufficient to show that any additional private communications occurred.”<sup>14</sup> Accordingly, the Complaint fails to allege any facts that, if true, demonstrate that the conduct prong of the Commission’s coordinated communication test is met, and thus the Complaint fails to allege that Respondents’ advertisement constitutes a coordinated communication and impermissible contribution.

## **B. The Complaint Alleges No Facts Establishing that the Advertisement Constitutes a Contribution by Disseminating, Distributing, or Republishing Campaign Material**

Additionally, the Complaint fails to provide sufficient evidence to demonstrate that the advertisement at issue constitutes a contribution by Respondents to the Committee by disseminating, distributing, or republishing campaign material.<sup>15</sup> The Complaint alleges that the advertisement constitutes republication of campaign materials as it contains similar themes as those present on the Committee’s website, as well as short, seconds-long clips of photographs and b-roll video footage of Theresa Greenfield.<sup>16</sup> However, the Commission has consistently failed to find reason to believe that the brief and sporadic incorporation of materials from a candidate’s public website in an advertisement amounts to republication under the Act or Commission regulations.

FEC regulations explain that no contribution occurs when “[t]he campaign material used consists of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views.”<sup>17</sup> In determining whether an entity has republished a candidate’s campaign materials under this regulatory standard, the Commission examines

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<sup>11</sup> Compl. p. 12.

<sup>12</sup> *Id.* p. 9.

<sup>13</sup> *Id.* p. 3 (Noting that the Committee updated its website in the first week of February and SMP began running its advertisement on February 25, 2020).

<sup>14</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 10 (May 4, 2017).

<sup>15</sup> 52 U.S.C. § 30116(a)(7)(B)(iii); 11 C.F.R. § 109.23(a).

<sup>16</sup> Compl. p. 3-4.

<sup>17</sup> 11 C.F.R. § 109.23(b)(4).

the degree of overlap between the two communications. The Commission has concluded that “mere thematic similarities between a candidate’s campaign materials and a third-party communication are insufficient to establish republication.”<sup>18</sup> According to the Commission, “similar sentences . . . do not rise to the level sufficient to indicate republication of campaign materials because of differences in wording or phrasing.”<sup>19</sup>

Further, the Commission has consistently failed to find reason to believe that an advertisement which contains short snippets of b-roll video footage from a campaign violates the Act or FEC regulations by disseminating, distributing, or republishing campaign material.<sup>20</sup> In MUR 6902, the Commission failed to find reason to believe a violation of the Act or FEC regulations occurred when an advertisement produced by an independent expenditure-only PAC contained video footage from a campaign committee’s advertisement. In the Statement of Reasons for voting against such a finding, three Commissioners wrote that “republication requires more than respondents creating and paying for advertisements that incorporate as background footage brief segments of video footage posted on publicly accessible websites by authorized committees of federal candidates. Here, snippets of b-roll footage of federal candidates were ‘incorporated into [ ] communication[s] in which [respondents] add[ed their] own text, graphics, audio, and narration to create [their] own message.’”<sup>21</sup> Similarly, in MUR 6357, the Commission failed to find reason to believe a violation occurred when American Crossroads, an independent expenditure-only PAC, used several clips of video footage posted online by the candidate or the candidate’s committee amounting to 10-15 seconds in a 30-second advertisement.<sup>22</sup> Three Commissioners stated that the use of campaign footage did not constitute republication because “the few fleeting images from [the campaign’s] footage are incorporated into a communication in which American Crossroads adds its own text, graphics, audio, and narration to create its own message. [The advertisement was] neither in whole nor in substantial part [ ] anything close to a carbon copy of the [campaign’s] footage.”<sup>23</sup>

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<sup>18</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 11 (May 4, 2017).

<sup>19</sup> *Id.* at 10 (citing to MUR 6502 (Nebraska Democratic State Central Committee), Factual & Legal Analysis at 9 (citing MUR 2766 (Auto Dealers and Drivers for Free Trade PAC) for the proposition that “similar sentences . . . do not rise to the level sufficient to indicate republication of campaign materials because of differences in wording or phrasing.”)).

<sup>20</sup> *See, e.g.*, MUR 7432 (John James for Senate, et al.), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 2 (Aug. 30, 2019) (In MUR 7432, the Commission failed to find reason to believe a violation occurred when a 30-second advertisement produced by a PAC contained 6 seconds of video from a campaign’s advertisement. In the Statement of Reasons, two Commissioners wrote that “[o]ur position on the Act’s republication provision has been consistent: ‘[It] is designed to capture situations where third parties [ ] subsidize a candidate’s campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate.’”).

<sup>21</sup> MURs 6603, 6777, 6801, 6870, 6902 (Al Franken for Senate 2014, et al.), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 2 (Dec. 17, 2015).

<sup>22</sup> MUR 6357 (American Crossroads), Factual and Legal Analysis at 1-2, 6-7 (Jan. 27, 2012).

<sup>23</sup> MUR 6357 (American Crossroads), Statement of Reasons, Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4 (Feb. 22, 2012).

Along similar lines, the Commission has also failed to find reason to believe that an advertisement which incorporates a photo taken from a campaign's publicly available website violates the Act or FEC regulations by disseminating, distributing, or republishing campaign material.<sup>24</sup> For example, in MUR 5996, the Commission dismissed a complaint concerning whether the use of a candidate's head shot obtained from a campaign's publicly available website by an independent group in an advertisement constituted republication. In an accompanying Statement of Reasons, three Commissioners explained that the activity at issue was "not the type of 'republication of campaign materials' contemplated by the Act and Commission Regulations. The traditional type of republication involves the reprinting and dissemination of a candidate's mailers, brochures, yard signs, billboards, or posters—in other words, materials that copy and convey a campaign's message."<sup>25</sup>

Here, just as in the matters referenced above, Respondents' advertisement only contains short snippets of candidate b-roll footage which contain no audio and convey no campaign messages and two photographs of Theresa Greenfield, each of which is only shown on screen for a few seconds. Furthermore, it is clear that Respondents' advertisement contains its own words and reflects its own message, as the majority of the video is not comprised of photos or b-roll footage from the Committee's website, the photos and b-roll footage in the advertisement did not contain or convey any campaign message, and Respondents added their own text, graphics, audio, and narration to create their own message. Although the Committee's website and the advertisement share similar themes, this is simply due to the fact that the statements at issue are general, widely-known facts about Theresa Greenfield's background, such as the fact that Theresa Greenfield worked on her family farm and that she was the president of a small business. No statements are taken verbatim from the document cited in the Complaint<sup>26</sup>; the statements are similar, but they contain different words and phrasings and accordingly do not rise to the level sufficient to indicate republication of campaign materials because of these differences.

Pursuant to established Commission precedent, the brief and sporadic incorporation of materials from the Committee's public website in an advertisement which contains its own words and reflects its own message does not amount to republication under 11 C.F.R. § 109.23(a). Accordingly, this Complaint does not allege facts establishing that the advertisement at issue constitutes a contribution by Respondents to the Committee under 11 C.F.R. § 109.23(a), and thus the Commission should dismiss the Complaint.

## CONCLUSION

The Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a precondition to opening an investigation into

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<sup>24</sup> See MUR 5996 (Tim Bee).

<sup>25</sup> MUR 5996 (Tim Bee), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 3 (Dec. 3, 2009).

<sup>26</sup> Compl. Exhibit B.



the alleged violation.<sup>27</sup> In turn, the Commission may find “reason to believe” only if a complaint sets forth specific facts, which, if proven true, would constitute a violation of the Act.<sup>28</sup> Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and they provide no independent basis for investigation.<sup>29</sup>

The Complaint has not alleged facts that provide a sufficient basis for the Commission to find “reason to believe” that the Act or Commission regulations have been violated. Accordingly, the Commission must reject the Complaint’s request for an investigation. It should instead immediately dismiss the Complaint and close the file.

Very truly yours,



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Rebecca K. Mears  
Counsel to Respondents

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<sup>27</sup> 52 U.S.C. § 30109(a)(2).

<sup>28</sup> See 11 C.F.R. § 111.4(a), (d); MUR 4960 (Clinton for U.S. Senate), Statement of Reasons, Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

<sup>29</sup> *Id.*